

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 16, 2009 Session

ANA MATILDE CALIXTO v. FERNANDO J. CALIXTO

**Appeal from the Circuit Court for Blount County
No. E-22024 W. Dale Young, Judge**

No. E2007-02281-COA-R3-CV - FILED JUNE 25, 2009

Ana Matilde Calixto filed a petition for an order of protection against her husband, the respondent Fernando J. Calixto. Based upon the petition, an ex parte order of protection was issued and served on the respondent. The trial court subsequently dismissed the petition and the ex parte order. The petitioner appeals. We vacate the trial court's judgment of dismissal and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. McCLARTY, JJ., joined.

Benjamin S. Pressnell, Tazewell, Tennessee, and Mike Whalen, Knoxville, Tennessee, for the appellant, Ana Matilde Calixto.

No appearance by or on behalf of the appellee, Fernando J. Calixto.

OPINION

Tenn. Code Ann. § 36-3-602(a) (Supp. 2008) provides, in pertinent part, as follows:

Any domestic abuse victim, . . . who has been subjected to, threatened with, or placed in fear of, domestic abuse, . . . , may seek a relief under this part by filing a sworn petition alleging domestic abuse, . . . , by the respondent.

“Abuse” is defined, in pertinent part, as follows:

“Abuse” means . . . , placing an adult . . . in fear of physical harm, . . .
Tenn. Code Ann. § 36-3-601(1) (Supp. 2008). A “domestic abuse victim” includes “[a]n adult[] . . . who [is a] current . . . spouse[.]” Tenn. Code Ann. § 36-3-601(5)(A). “ ‘Domestic abuse’ means

committing abuse against a victim,” as victim is defined in subdivision (5) of Tenn. Code Ann. § 36-3-601, *see* Tenn. Code Ann. § 36-3-601(4), which subdivision (5), as previously noted, includes a current spouse.

In the case now before us, the petitioner alleged under oath as follows:

Approx. 2 wks. ago, the respondent was screaming in front of petitioner’s home that he was going to get her and take care of her, and then he would have the children to himself. On 8-27-07 or 8-28-07, he left a message on her phone stating that he would get her, make her lose her job, and make sure that he gets the children. He is harassing her by calling her constantly almost every day, he said he would destroy her life. Petitioner fears for her safety.

When the petitioner appeared in the trial court on September 7, 2007, she was not represented by counsel. The record before us reflects that she does not speak fluent English. The record does not indicate whether a Spanish interpreter was present in the courtroom at the time of her appearance.

By order entered the day of the hearing, the trial court dismissed the petition. Interestingly enough, the “costs [were] taxed equally.” In a subsequent order entered October 3, 2007,¹ the trial court, by way of its findings of fact and conclusions of law, stated, in part, as follows:

When Mrs. Calixto came to Court *pro se* on September 7, 2007 seeking a Permanent Order of Protection against Mr. Calixto, in open Court she was asked a few simple, preliminary and quite routine questions by the Court. Mrs. Calixto’s Petition for a Permanent Order of Protection did not allege physical abuse or threat of physical abuse. Upon being questioned in open Court, she did not allege any of these threshold requirements. It was apparent to the Court that Mrs. Calixto had not been physically abused nor was she in any physical danger.

(Bold print and italics in original.) While it is not entirely clear, we interpret the court’s comments as meaning the court dismissed the petition because it determined that the petitioner’s *allegations* were insufficient to warrant a hearing. We do *not* understand the court’s comments to mean that the petitioner was permitted to offer proof on her allegations. Hence, we treat this case as being one where the trial court, acting *sua sponte*, dismissed the petition because of its failure, in the opinion of the trial court, to allege a cause of action under the order of protection statutory scheme. With this decision, we disagree.

¹This order denied the petitioner’s application to proceed on appeal as a poor person. Following the entry of this order, the petitioner’s attorney filed an appeal bond with himself as surety.

Much of the record before us references matters not germane to this appeal. For example, the record mentions the fact that there is before the trial court a pending divorce action between the parties. There is also much in the record pertaining to the court's dialogue with the petitioner pertaining to her status in this country and the identity of the country of her birth and prior residence. Furthermore, we have before us the trial court's extensive comments as to why the court would not permit the petitioner to proceed on this appeal as a poor person. Even the petitioner's brief on appeal attempts to call our attention to the issue of whether the trial court erred in focusing on the petitioner's status. As we see it, none of this constitutes the real issue. The real substantive issue in this case is whether the petition before us alleges a *basis* for the entry of an order of protection.

The trial court treated this case as if it were one where a respondent had filed a Tenn. R. Civ. P. 12.02(6) motion. We will approach it in the same manner. As for failure to state a claim upon which relief could be granted, the Supreme Court has noted:

A Rule 12.02(6), Tenn. R. Civ. P., motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof. Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief.

Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997) (citation omitted).

The order of protection statutory scheme, Tenn. Code Ann. § 36-3-601, *et seq.*, is designed to address, among other things, the well-known widespread ill of one spouse "abusing" his or her mate. Here, we have a case where the petitioner alleges that, on August 27, 2007, or August 28, 2007, her husband was in front of her house "screaming" and stating that "he was going to get her and take care of her, and then he would have the children to himself." Can one reasonably construe this language as showing that the respondent was contemplating benevolent conduct? Clearly, the answer is no. He obviously had a different kind of "care" in mind. In our judgment, these allegations, if proven, are such as to place any reasonable person in "fear[] for her [or his] safety." The petitioner was entitled to a plenary hearing and an opportunity to prove her case. The trial court erred in not giving her that chance.

The judgment of the trial court is vacated and this case is remanded to the trial court for further proceedings. Costs on appeal are taxed to the appellee, Fernando J. Calixto.

CHARLES D. SUSANO, JR., JUDGE